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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JOSEPH MONSON,

Defendant and Appellant.

D074885

(Super. Ct. No. FSB1001399)

APPEAL from a judgment of the Superior Court of San Bernardino County,  
William Jefferson Powell, IV; R. Glenn Yabuno, Judges. Affirmed in part and reversed  
in part, with directions.

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Heidi  
Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Michael Monson guilty of first degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a)), and found true the allegation that he personally discharged a firearm, causing great bodily injury or death (§ 12022.53, subd. (d)). The trial court imposed consecutive terms of 25 years to life on the conviction and the enhancement.

Monson raises several challenges on appeal. First, he contends he received ineffective legal assistance at trial because his counsel failed to assert meritorious objections to (1) the prosecutor's allegedly improper assertion during closing argument that the law does not allow a defendant armed with a gun to claim self-defense against a person armed with a knife, and (2) a hypothetical question posed to a forensic pathologist about conclusions drawn from the appearance of a gunshot wound. These contentions lack merit because it is not reasonably likely the jury interpreted the prosecutor's assertions during closing argument as a statement of law, and defense counsel may have had valid tactical reasons for not objecting to the hypothetical question posed to the expert.

Second, Monson contends the trial court deprived him of his *federal* due process rights by concluding the Victims' Bill of Rights contained in the *state* constitution deprived the court of jurisdiction to allow the defense to inspect the crime scene—the murder victim's residence—over the objection of the victim's surviving relatives who still lived at the residence. (Cal. Const., art. I, § 28, subd. (b), par. (5).) We need not reach

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

the merits of this contention because Monson has not met his burden of showing that any alleged error was prejudicial.

Third, Monson contends he is entitled to a limited remand to make a record of information relevant to an eventual youth offender parole hearing because the Legislature recently extended eligibility for such hearings to offenders (like Monson) who were 25 or younger when they committed their controlling offense. The Attorney General does not oppose this request. We will remand for this limited purpose.

Finally, Monson contends he is entitled to be resentenced under a recent legislative amendment that now grants sentencing courts the discretion to strike firearm enhancements that previously were mandatory. The Attorney General does not oppose this request. We will remand for this limited purpose.

In all other respects, the judgment is affirmed.

#### FACTUAL AND PROCEDURAL BACKGROUND

On April 6, 2010, Monson fatally shot Luis Moya, the de facto stepfather of Monson's ex-girlfriend, Sonja O. Monson claimed he shot Moya in self-defense after Moya attacked him while being confronted about allegedly molesting Monson and Sonja's toddler daughter (Daughter).

Three days after the shooting, and before Monson was apprehended, the district attorney charged him with murder and alleged a variety of firearm-use enhancements. Trial initially began in December 2010, but the court granted Monson's request for a mistrial to allow further investigation.

For reasons not fully explained in the record, Monson's new trial did not begin until July 2017. The jury ultimately found him guilty of first degree murder, and found true the firearm-use enhancement allegations.

### *The Prosecution Case*

Monson began dating Sonja in 2005 and later moved in with her and her family. At the time, Sonja lived with her older sister (Gina); her mother (Sharon); and her "stepfather" (Moya), who had been in a relationship with Sharon for 20 or 30 years. Monson and Sonja later moved into an apartment together and had Daughter in 2008. The couple broke up in 2009 because Monson began using drugs and had affairs with two of Sonja's cousins. Sonja and Daughter moved back into the family home.

After the break up, Monson was not allowed in Sonja's home. He threatened to "shoot anybody she was with," and she "[was] terrified of him."

Three days before the shooting, Monson sent Sonja a text message containing a photograph of him flashing a gang sign and displaying a gun that he always carried. In the accompanying message, Monson told Sonja he was going to shoot her.

The day before the shooting, Monson and Sonja exchanged numerous text messages. The messages began cordially, with Monson offering to provide Sonja financial support. When Monson texted that he "doesn't trust what [Moya] did to her and Gina," Sonja responded that she "doesn't know what he's talking about." Monson told Sonja he had had sex with other women, and Sonja responded in kind. Monson responded that "he will let his homies run a train on her" and then "we'll smoke you" (slang for letting his friends have sex with her and then kill her). Monson added, "We

will rob you and we will get away with it because we are scandalous like that." Sonja asked Monson to stop texting her. Monson responded, "[F]uck you and fuck my daughter," adding that he would "disown[]" them. Monson said he would stop texting Sonja, but when he resumed, she changed her phone number.

About 1:00 p.m. on the day of the shooting (April 6, 2010), Monson knocked on the side door of Sonja's family home. Sonja was home with Daughter, Gina, and Moya; Sharon was at work. Sonja answered the door and saw Monson and a male friend of his whom she did not know. Monson said he wanted to see Daughter. Sonja let Daughter walk outside to see Monson, then locked the door.

About 10 minutes later, Monson knocked on the door. When Sonja opened it, Monson entered and asked for a drink of water. He then entered Sonja's room and gestured for her to join him. Sonja feared he would do something to her, but she joined him anyway. Monson told Sonja to bring Daughter with her, and to tell Gina to go outside. Sonja told Monson to get out, but he refused. He had a "serious demeanor" that gave Sonja "a bad vibe."

Monson went to the living room to get some water. Sonja followed, carrying Daughter. Gina was watching television in the living room, and Moya was standing in the adjoining kitchen, holding a knife and making himself a sandwich.<sup>2</sup>

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<sup>2</sup> A photograph of the knife was introduced as a trial exhibit, but it is not in the appellate record. A police detective described it at the preliminary hearing as a butter knife, "[n]ot a pointed steak knife or anything." Monson described it in a police interview as "a table knife."

Monson asked Moya if he knew how to fix a certain car part, but Moya said he did not. As Moya faced away from Monson, Monson suddenly pulled out a gun, extended his arm toward Moya, said "mother fucker," and shot at Moya from about five feet away. Monson missed. Moya turned toward Monson and grabbed for the gun. Monson fired and missed again. Moya and Monson then struggled for the gun, ending up in the hallway. Gina ran outside, and Sonja grabbed the house phone and ran outside with Daughter to call 911.

As Sonja ran outside, Monson's friend pointed a gun at her. When he realized it was her, "he just stopped," and Sonja ran to the front of the house. Sonja heard a third gunshot, then saw Monson run out of the house and down the street. Sonja called 911 and reported that Monson had just shot Moya.

A police officer responding to Sonja's 911 call found Moya in the hallway with his right hand over his forehead and gasping for air. The officer summoned paramedics, who transported Moya to the hospital, where he died a few hours later. An autopsy determined Moya died from a single gunshot wound to the head.

Crime scene analysts recovered three spent shell casings from the crime scene: one on the kitchen floor, one on the kitchen floor near the hallway, and one on the hallway floor. There were two bullet holes in the kitchen wall, and none in the hallway. There was a large, thick pool of blood on the hallway floor, and no blood anywhere else. Crime scene photographs showed a sandwich on a plate with a butter knife next to it on the kitchen table, and meat and lettuce in the hallway.

In a police interview, Sonja said Monson made disparaging comments about Moya, called him a "pervert," and said he did not want Moya around Daughter. She said Monson had threatened her in the past, including by pulling a gun on her, but she was afraid to report the threats to the police for fear that something like this would happen.

The day after the shooting, Monson called his aunt and told her he shot Moya, but "it was an accident, [and] he didn't mean to do it." When the aunt told Monson to turn himself in, he hung up on her. Monson called her again the next morning to tell her he shot Moya in self-defense. Monson explained he confronted Moya about molesting Daughter, Moya pulled a knife or a hatchet, a struggle ensued during which Moya stabbed Monson, and Monson shot Moya in self-defense.

The aunt asked Monson why he suspected Moya of molesting Daughter. In a police interview, the aunt said Monson "just didn't answer . . . and was really evasive with it when she asked him." At trial, however, the aunt said Monson explained it was because Sonja told him Moya had molested her. Monson asked the aunt for the phone number of another aunt who lived in Ohio, which led the first aunt to believe Monson intended to flee to Ohio. When the aunt told Monson to turn himself in, he hung up on her again. At some point, he mentioned he was afraid to turn himself in because the police might shoot him.

Before being apprehended, Monson began a public relations campaign that the investigating detective characterized as "unique." Monson told his self-defense story in a phone call to a local newspaper and in letters to the investigating detective, the district attorney, the Attorney General, and the Governor. Monson sent the police a torn T-shirt

he said he was wearing the day of the shooting. Police found no blood on the shirt.

Monson also sent the police photographs showing a scratch on his neck that he claimed he sustained during the struggle with Moya.

Police finally located and arrested Monson at a friend's home about six weeks after the shooting. In an earlier search of Monson's home, police found gang paraphernalia and holsters containing ammunition.

After waiving his *Miranda*<sup>3</sup> rights, Monson spoke to detectives.<sup>4</sup> He explained he went to Sonja's house because he suspected Moya was molesting Daughter because Sonja had previously told him (Monson) that Moya had forced sex on her mother and sister. Monson did not intend to harm anyone; he was carrying a concealed handgun only because he is a gang member and Sonja lives in the territory of a rival gang that had previously shot at him and killed other rivals.

Monson told the detectives Sonja was not happy to see him. He went into Sonja's room to change Daughter's diaper, but he could tell something was wrong with her. Monson asked Sonja to take Daughter outside so he could talk to Moya alone, "to give [him] . . . respect as a man" and "to save his pride." Monson planned to confront Moya, then offer him about \$120 to "[g]o back to Mexico and never come back again." Monson acknowledged this "wasn't a . . . well thought out plan."

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<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

<sup>4</sup> A recording of the interview was played for the jury.

Sonja, however, did not go outside. Instead, she followed Monson to the kitchen, where Moya was cutting food with a table knife. Sonja began panicking. When Monson asked Moya whether what Sonja had told him about molesting women was true, Moya had a look of realization as he made a "passing look at Gina on the [living room] couch." Moya cursed at Monson in Spanish, looked at Monson's waist area to see if he was armed, and lunged toward Monson with the knife.

Monson backed up and warned, "Put the fuckin' knife down," and "mother-fucker, stop." When Moya did not desist, Monson pulled out his handgun, chambered a round, and fired a warning shot to the right of Moya's head. As Moya continued undeterred, Monson continued to back away and fired a warning shot to the left of Moya's head. Moya continued advancing on Monson and grabbed his throat as the men fell to the ground.

On the ground, Monson and Moya struggled for control of the gun. As both men tried to get up, Moya shook the gun in Monson's hand, causing it to fire. Moya's hair moved and he "stopped resisting." Monson knew Moya was hit. Monson ran off and threw the gun in a dumpster.

Monson told the detectives he was not afraid of Moya. Monson was "fast," "healthy," and "strong," and "would have no problem whipping [Moya's] little fuckin' old ass." Monson also said, "You don't bring a knife to a gun fight" because "guns usually win." Monson was proud of the "judgment" and "restraint" he exercised by not "pump[ing] more into [Moya's] body . . . ."

At trial, Sonja and Gina denied that any argument or provocation preceded the shooting, or that Moya had ever molested them or Daughter. Sonja further denied ever telling Monson that Moya had molested her, or that Monson ever told her he suspected Moya of doing so.

### *The Defense Case*

Monson testified in his own defense, largely consistently with the statement he gave to detectives. Three days before the shooting, Monson thought something was wrong with Daughter because "she had rashes on her private areas" that resembled "stubble burn" and "she was acting afraid of [Monson] . . . and . . . other men." When Monson asked Sonja about the rashes, she became "real defensive" like she "knew something was going on . . . , but she didn't want to admit it." Monson recalled that, back in 2006, he and Sonja were drinking alcohol one day when Sonja disclosed that Moya had done "things to her sister and her when they were younger." Monson "suspected, but . . . never believed [Moya] to be the culprit of the reason [his] daughter was acting like that."

Monson acknowledged exchanging text messages with Sonja the day before the shooting. He said he did not mean the things he wrote that were mean, and did mean the things he wrote that were nice.

The day of the shooting, Monson went to Sonja's house to check on Daughter. He did not go there with the intention of killing Moya. Monson was armed only because Sonja lived in rival gang territory.

Once at Sonja's house, Monson took Daughter into Sonja's room to change Daughter's diaper. When Monson saw she "still had those rashes and . . . was still acting afraid," he asked Sonja to take Daughter and Gina outside so he could have a "private discussion with" Moya about the things Sonja had told him. Sonja picked up Daughter, began crying, and walked into the kitchen and stood behind Moya, who was sitting at the table cutting food.

Moya stood up with the knife in his hand and "flexe[d] his shoulders like real intense." Monson asked for a drink of water and went to the living room. When Monson returned to the kitchen, he and Moya made eye contact and Moya asked, "que paso?" Monson set his cup on the table, took some money out of his pocket, and said he had a friend who could take Moya wherever he needed to go. When Moya asked what Monson meant, Monson said, " 'I don't know if whatever . . . Sonja told me about you doing to the girls was true or not, but I think something is happening to my daughter . . . ' "

When Monson mentioned Daughter, he "notice[d] . . . a visible change coming over [Moya's] demeanor." Moya looked at Sonja, Daughter, Gina, and Monson's waist. Moya put his hand—the one that had been holding the knife—behind his back in a "funny" manner. He mumbled "mother F---er" in Spanish and moved suddenly in Monson's direction, bumping into the table in the process. This startled Monson, who thought Moya was charging him with the knife.

Monson pulled out his handgun, chambered a round, told Moya to "[p]ut the fucking knife down," and stepped back and fired warning shots on either side of Moya's head. Moya continued advancing on Monson and grabbed his throat. Moya worked

construction and was "pretty strong." Monson fell to the hallway floor, landing on his back; Moya landed on top of him and reached for the gun. Monson "buck[ed]" Moya off and they rolled on their sides. As Monson held the gun in his right hand, Moya grabbed Monson's right arm with both hands to shake the gun out of Monson's grip. As Monson was starting to get up, the gun discharged and "a gust of wind blew [Moya's] hair." Monson knew Moya had been shot.

Monson got up and ran out of the house. He explained he did not turn himself in because the "whole situation was serious" and he knew he needed legal representation.

On cross-examination, Monson acknowledged (1) Daughter's rashes resembled diaper rash; (2) he was "[n]ot sure" if Moya was still holding the knife when he advanced on Monson; (3) he "did . . . not call 911 and try to help [Moya]" after the shooting; (4) he forgot to tell the detective about Moya hiding his hand behind his back; and (5) he told the detective "that during the incident [he] ha[d] the upper hand because [he] had a gun," and "[g]uns always win" versus knives.

### *Verdict, Enhancements, and Sentencing*

The jury found Monson guilty of first degree murder. The jury also found true the enhancement allegations that Monson personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)).

The trial court sentenced Monson to consecutive terms of 25 years to life on the murder count; and 25 years to life on the enhancement for discharging a firearm, causing

great bodily injury or death (§ 12022.53, subd. (d)). The court imposed but stayed prison terms on the remaining firearm-use enhancements.

## DISCUSSION

### I. *Ineffective Assistance of Counsel*

Monson contends his trial counsel performed ineffectively by failing to assert meritorious objections to (1) the prosecutor's alleged misstatement of the law during closing argument "that a defendant may not claim self-defense when he uses a gun to defend against a knife, because a gun is a superior weapon"; and (2) a hypothetical question posed to the forensic pathologist about conclusions drawn from the appearance of a gunshot wound. These contentions lack merit.

#### A. *Relevant Legal Standard*

"Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel." (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 466.) "When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide

range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).)

#### B. *Prosecutor's Closing Argument*

Before closing arguments, the trial court instructed the jury regarding relevant legal principles, including self-defense. Specifically, the court read CALCRIM No. 505, which states:

"The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense or defense of another. . . . if:

"1. The defendant reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury;

"2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against this danger; [¶] AND

"3. The defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to himself or someone else. Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified."

In closing, the prosecutor argued the elements of self-defense were not satisfied. After reciting the first two elements, the prosecutor said: "What evidence do we have? At the time when the first shot is shot at [Moya], [Moya]'s back is turned to the defendant. [Moya] is at the table with a half-eaten sandwich eating lunch."

Turning to the third element, the prosecutor argued:

"The last element is the defendant used no more force than was reasonably necessary to defend against that danger. The only possible other weapon, according to the defendant, would have been that knife. *That knife remained on that kitchen table next to the pickle next to the sandwich.* Defendant uses a gun in this situation. And by the defendant's own words, if there's a fight between a gun and a knife, the gun always wins. Right?

"The defendant can't use more force than reasonably necessary against that danger. We know that he knows that a gun is more force than necessary because it will always win over a knife. *There is an excerpt of the defendant's own words in his interview with [the detective].* We need all three of those elements for you to find self-defense. *The facts in this case and the evidence, right, don't meet all three elements of self-defense, and we don't have self-defense.*" (Italics added.)<sup>5</sup>

Monson maintains the prosecutor's argument regarding the third element misstated the law of self-defense by misinforming the jury "that a defendant may not claim self-defense when he uses a gun to defend against a knife . . . ." We disagree.

"[I]t is improper for the prosecutor to misstate the law . . . ." (See *People v. Hill* (1998) 17 Cal.4th 800, 829; *People v. Cortez* (2016) 63 Cal.4th 101, 130.) When a claim

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<sup>5</sup> In quoting this passage in his opening brief, Monson omitted the clauses that we italicized. As we will explain, these omitted clauses provide critical context to the prosecutor's argument.

of prosecutorial misconduct " ' "focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' ' " (*People v. Woodruff* (2018) 5 Cal.5th 697, 755; see *Cortez*, at p. 130.)

We conclude it is not reasonably likely the jury construed the prosecutor's closing argument as an assertion that *the law* does not allow a claim of self-defense by a defendant armed with a gun when the victim is armed with only a knife. Reading the relevant portion of the argument *in its entirety*, it is clear the prosecutor framed his argument as one of *fact*, not law.

To begin with, the prosecutor made the factual argument that Moya was not actually armed with the knife. As crime scene photos showed, it was still on the kitchen table after the shooting.

Even assuming Moya was armed, the prosecutor made another *factual* argument based on Monson's police interview. Twice, the prosecutor clarified that her argument was based on "the defendant's own words" and "an excerpt of the defendant's own words in his interview with [the] [d]etective." The prosecutor emphasized the factual nature of her argument by stating "[t]he *facts* . . . and the *evidence*" do not support a finding of self-defense. (Italics added.) She never argued *the law* does not allow a claim of self-defense when the defendant is armed with a gun.

By contrast, the prosecutor made clear in other contexts when she was referring to what *the law* says. Regarding formation of the intent to kill, the prosecutor argued: "Now, the defense keeps saying that the defendant didn't have an intent to kill when he

woke up that morning and went over to the house. . . . *That is not what the law says.* The intent to kill has to be simply before he pulled that trigger. The intent to kill can be formed instantaneously. . . . *That's the state of the law.*" (Italics added.) Later, she made the related argument "[t]hat intent to kill is formed instantly and *the law says* that's okay." (Italics added.)

Similarly, regarding the malice element, the prosecutor argued "*the law of murder says* that malice aforethought makes murder." (Italics added.)

Regarding the potential reduction of murder to manslaughter on a heat-of-passion theory, the prosecutor argued: "[I]t is not enough that the defendant was simply provoked. Remember, *the law* also takes into account commonsense and *the law says* defendant is not allowed to set up his own standard of conduct, right?" (Italics added.)

Finally, regarding the strength of witness testimony, the prosecutor argued: "Now, going back to *the law*, right, we talked about how the testimony of one witness alone can prove any fact if you find them credible. *That's the state of the law* whether you agree with it or not." (Italics added.)

Considering the prosecutor's closing argument in context, it is not reasonably likely the jury would have construed her express references to Monson's police interview and the physical evidence as statements of what *the law says*. Consequently, Monson's trial counsel did not perform deficiently by failing to object to the prosecutor's argument. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1080 ["Counsel's failure to make a meritless objection does not constitute deficient performance."].)

### *C. Expert Testimony*

Monson's trial counsel objected to two hypothetical questions the prosecutor posed to the forensic pathologist who performed the autopsy on Moya. The trial court overruled the objections.<sup>6</sup> When the prosecutor then posed a third question based on a modified hypothetical scenario, Monson's trial counsel did not object. Monson contends his counsel performed deficiently by failing to do so. We disagree.

#### *1. Background*

Dr. Glenn Holt, the forensic pathologist who performed an autopsy on Moya, testified for the prosecution. Dr. Holt had 17 years' experience, during which he conducted about 1800 autopsies and testified in about 150 trials.

Dr. Holt testified Moya died from a gunshot wound to the head. The bullet trajectory was "a little bit downward," entering the middle of Moya's forehead and exiting the back of his head "a couple inches" lower. Based on the path the bullet traveled through Moya's brain, "[h]e would have been unconscious right away, but he would have breathed." Moya also had a three-inch contusion on the right side of his chest. He had no other injuries, including on his hands.

Dr. Holt explained how forensic pathologists determine gunshot distance using the presence or absence of "stippling"—"small punctate and abrasions that are caused by the unburned gunpowder striking the skin":

"When a gun is discharged, not only does the bullet come out of the gun, but also the gases and the gunpowder. And the gunpowder

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<sup>6</sup> Monson does not challenge these rulings in this appeal.

burns very quickly and some of it comes out as soot and some of it doesn't burn and comes out as unburned gunpowder. . . . [¶] And they will travel a certain distance away from the muzzle of the gun and give us some sort of an idea about the range of fire. That is to say, . . . the short version, if we see soot, it's a close range. If we see stippling, that's an intermediary range. And really stippling is the sine qua non of an intermediate range gunshot wound. If you see stippling, it is intermediate range. If you don't see it, it is not intermediate. It can be closer or it can be farther. [¶] . . . [¶]

". . . . Usually if you are seeing stippling only, it could be maybe a millimeter, which is less than an inch away from the skin. On the far end, . . . the range . . . commonly given is 18 inches to 24 inches. It may go farther than that. [¶] . . . [¶]

"[T]he short answer[:] if you don't see stippling, you are at least about 18 inches out or more."

Dr. Holt testified he did not see any definitive stippling around Moya's entry wound, and if there were any, it "would be at the outer range of how far stippling can be."

Based on this information, the prosecutor questioned Moya about several hypothetical scenarios aimed at determining the relative positioning of the shooter and the victim. The first scenario asked whether one would expect to see stippling near the entry wound "if the shooter and the victim were both falling back and there was a struggle over the firearm." Defense counsel objected that Dr. Holt was not qualified to opine on this topic, and that "there is no way to make a determination of the position of the body when they were struggling or when they fell." The trial court overruled these objections.<sup>7</sup> Dr. Holt responded that the absence of stippling indicated "the muzzle of

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<sup>7</sup> Monson does not challenge these rulings in this appeal.

the gun was probably at least 18 inches or more away from the forehead" and at a slightly downward trajectory relative to an upright head position.

The prosecutor refined her hypothetical scenario so that the falling victim's neck was flexed, to account for the downward trajectory. Defense counsel objected that the question "assumes facts not in evidence." The court overruled the objection.<sup>8</sup> Dr. Holt responded that the bullet trajectory was downward relative to a "standard anatomic position," but this did not indicate the relative positioning of the shooter and victim during the struggle.

When the prosecutor refined her hypothetical scenario to reflect a struggle for the gun, the following exchange occurred *without objection from defense counsel*:

"Q [By the prosecutor] Now, if hypothetically . . . the shooter is holding the gun and the shooter and the decedent are struggling over the gun, would you expect to find stippling on the decedent?

"A Given the range that stippling can occur in and . . . just given human anatomy, how far can one extend their arms and, . . . considering . . . probably the neck flexed forward, . . . the neck flexed forward or slight, you know, being struggled from above, given all that and also given the lack of marks on the hands, if there was a struggle, . . . in this most likely scenario, I would expect to see stippling on the head and possibly some sort of marks on the hands as well.

"I'm not a ballistics person. How laterally they can go, I don't know. But if the hand is near the muzzle, there's also a possibility you'd see stippling on the hands as well.

"Q And you didn't see any markings or injuries on the hands, correct?

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<sup>8</sup> Monson does not challenge this ruling in this appeal.

"A I did not."

During cross-examination, defense counsel questioned Dr. Holt extensively about his education and training. Counsel established that during Dr. Holt's 16 years of education, he took no courses in ballistics. And although Dr. Holt agreed a ballistics expert "would probably be more involved with" determining soot and stippling differences associated with various types of firearms, Dr. Holt insisted he was qualified to determine "in general terms what the range of fire is."

Defense counsel concluded his cross-examination by questioning Dr. Holt about a hypothetical scenario involving a shooter whose arms are longer than 18 inches:

"Q So then if I had my arm extended up and was trying to struggle over a gun and the victim was grabbing my arm and shaking it around and I was trying to keep him from pulling away, the gun went off, it was up in the air and went down and hit him in the head, that could account for this, couldn't it?

"A It's possible that there was a struggle there. The arms are way out extended and no stippling was received. I can't say that is not a possibility."

## 2. Analysis

Assuming without deciding that an objection to the prosecutor's third hypothetical question would have been meritorious, Monson has not met his burden of showing that the failure to object was deficient because his trial counsel may have had legitimate tactical reasons for not doing so. (See *People v. Salcido* (2008) 44 Cal.4th 93, 172 [" '[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.' "]; *Mai, supra*, 57 Cal.4th at p. 1018 [" '[S]uch matters as

whether objections should be made and the manner of cross-examination are within counsel's discretion and rarely implicate ineffective assistance of counsel.' "].)

For example, because the court had just overruled objections to two related questions, counsel may have been concerned that objecting again—regardless of merit—would draw undue attention to this line of questioning. Alternatively, counsel may have found it more appropriate to focus, as he did, on Dr. Holt's lack of specific education in ballistics. Or, counsel may have preferred to rely on Dr. Holt's expertise by posing questions based on hypothetical scenarios favorable to the defense.

Because Monson's trial counsel appears to have availed himself of several strategic alternatives to objecting, Monson has not met his burden of showing his counsel's performance was deficient.

## II. *Denial of Inspection Request*

Monson contends the trial court deprived him of his *federal* due process rights by concluding the Victims' Bill of Rights contained in the *state* constitution deprived the court of jurisdiction to allow the defense to inspect the crime scene over the objection of the victim's surviving relatives. We need not resolve this constitutional question because, even assuming the trial court erred, Monson has not shown the error was prejudicial. (See *People v. Leon* (2007) 40 Cal.4th 376, 396 [" 'As a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions.' "]; *Service Employees Internat. Union, Local 1000 v. Department of Personnel Admin.* (2006) 142 Cal.App.4th 866, 872 ["we subscribe to the venerable jurisprudential principle to avoid constitutional questions where other grounds are available"].)

### A. Background

On September 14, 2012 (more than two years after the shooting), Monson moved ex parte for an order granting him access to the crime scene. In a supporting declaration, Monson's trial counsel provided the following justification for the inspection request:

"3. I have retained a crime scene expert, Lisa Allyn DiMeo from Arcana Forensic Services. Ms. DiMeo has reviewed the discovery and has highlighted a certain, specific photo of the scene as potentially containing exculpatory evidence.

"4. The photo Ms. DiMeo has focused on was provided by the prosecution, along with a number of other photos and police reports. Ms. DiMeo enlarged the photo to attempt to get a closer look at the area of interest. However, she has informed me that she, along with a second expert to assist her, need to look at the actual, physical area of interest in order to determine the validity of her hypotheses. ([T]he photo cannot provide sufficient detail, even with magnification[.])

"5. If she can examine the area, she may be able to find physical evidence which would be exculpatory, as it would support Mr. Monson's story that this was an accident."

Monson argued in his motion that *Bullen v. Superior Court* (1988) 204 Cal.App.3d 22 (*Bullen*) authorized the requested inspection. In *Bullen*, the defense sought an order compelling the murder victim's widow to grant the defense team access to the crime scene—her home—for further investigation. (*Id.* at p. 24.) Defense counsel supported the discovery request with a declaration explaining his need for the discovery: " 'It is extremely important that the defense team be allowed reasonable access to the alleged scene of the crime, the residence [of petitioner]. This is necessary to view the scene of the crime, observe spatial distance, investigate possible defense theories and to generally prepare examination and cross-examination of key witnesses.' " (*Id.* at pp. 26-27.) When

the trial court granted the requested relief, the widow filed a petition for writ of mandate in the Court of Appeal, which vacated the order. (*Id.* at pp. 24, 27.)

The *Bullen* court observed that resolution of the merits of the widow's challenge "implicates competing fundamental interests involving [her] right to privacy in her own home and [the] defendant's right to a fair trial and a defense informed by all relevant and reasonably accessible information." (*Bullen, supra*, 204 Cal.App.3d at p. 25.) However, the court found it unnecessary to "resolve this clash of competing interests because, even assuming that [the trial] court had jurisdiction to make the order in question on an adequate showing of need, [the] defendant failed to make such a showing." (*Id.* at pp. 25-26.) The court explained that defense counsel's declaration was "conclusional and thus inadequate to support judicially compelled access to [the widow]'s home with the resulting deprivation of her right to privacy in and freedom from unwanted intrusions into her home." (*Id.* at p. 27.)

Relying on *Bullen*, the trial court granted Monson's request and issued an order allowing the defense expert "to examine, photograph, and conduct nondestructive testing of" the crime scene.

The defense team went to the crime scene to notify Sharon of the court's order and to arrange a time to return to conduct the authorized inspection. Sharon contacted the prosecutor, who filed an "opposition" seeking to "rescind" the ex parte discovery order.<sup>9</sup>

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<sup>9</sup> In his opening brief, Monson argued the prosecutor was not authorized to represent Sharon in these proceedings. Monson withdrew the challenge in his reply brief. (See Cal. Const., art. I, § 28, subd. (c), par. (1) ["[T]he prosecuting attorney upon request

The prosecution argued *Bullen* did not authorize the crime-scene inspection because that court never reached the merits of the issue, and, in any event, *Bullen* was superseded by the more recently adopted Victims' Bill of Rights, which grants crime victims the right "[t]o refuse a[] . . . discovery request by the defendant . . . ." (Cal. Const., art. I, § 28, subd. (b), par. (5).) The trial court ordered that its previous discovery order be "stayed pending opportunity for [Moya's] family to be heard."

One week later, the court heard from Sharon, who objected to the discovery request. Sharon explained, "[Monson] came to my home, took [Moya's] life, [and] made a spectacle of my home and my family. . . . I don't want them to come in and do the same thing all over again."

The trial court found that although it had previously relied on *Bullen*, which implicitly authorized the inspection order, "when the court was reviewing [*Bullen*] it did not review" it in light of the Victims' Bill of Rights, the language of which the court viewed "is mandatory as opposed to discretionary." Upon a more comprehensive consideration of the applicable law, the court concluded that under the Victims' Bill of Rights, "the court believes that it does not have the jurisdiction to make the order for inspection of the property over the objection of the victim's family."

### B. *Analysis*

Assuming without deciding that the trial court erred by concluding the Victims' Bill of Rights deprived the court of jurisdiction to order an inspection of the crime scene,

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of the victim, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right."].)

Monson has not met his burden of establishing prejudice under any standard. (See *People v. Gaines* (2009) 46 Cal.4th 172, 181 [" 'It is settled that an accused must demonstrate that prejudice resulted from a trial court's error in denying discovery.' "]; *People v. Trujeque* (2015) 61 Cal.4th 227, 279 [errors of " 'federal constitutional dimension' " are subject to "the beyond a reasonable doubt standard of prejudice" under *Chapman v. California* (1967) 386 U.S. 18]; *People v. Elder* (2017) 11 Cal.App.5th 123, 133 ["the denial of a defendant's motion to compel discovery is subject to harmless error analysis under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836].)

Monson has made virtually no effort to demonstrate prejudice. He devotes about one page of his opening brief to the topic, and makes no mention of it in his reply brief. The prejudice section of his opening brief sets forth what appears to be a cumulative-error argument.<sup>10</sup> But because we have rejected his other claims of error, there can be no cumulative error. (See *People v. Bennett* (2009) 45 Cal.4th 577, 618.)

Under a heading in his opening brief titled "Reversal is required" (bolding omitted), Monson argues that because "this was a close case that the jury had difficulty deciding," reversal is required because "the trial court's erroneous refusal to grant

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<sup>10</sup> Monson writes: "[Monson] has discussed in Part I of Argument that his defense was impaired, because the prosecutor misstated the law of self-defense in a way that made the defense unavailable to him, but defense counsel did not object. [Monson]'s defense was further impaired, because Dr. Holt rendered an improper expert opinion that was tantamount to an opinion that Monson's account of the shooting was not true, but defense counsel did not object. The trial court's denial of Monson's due process right to examine the crime scene *is yet another error in a string of errors, which, collectively, unconstitutionally impaired Monson's defense.*" (Italics added.)

Monson access to the crime scene was not harmless beyond a reasonable doubt." But Monson offers no explanation whatsoever of how an inspection of the crime scene would have altered the outcome of the trial. His trial counsel's declaration in support of the discovery motion was no more detailed than the declaration deemed inadequate in *Bullen*, *supra*, 204 Cal.App.3d at pages 26 to 27. Counsel merely told the court his expert identified "a certain, specific photo of the scene as potentially containing exculpatory evidence" that "cannot provide sufficient detail, even with magnification." Trial counsel did not explain what the picture was of, how it was potentially exculpatory or corroborative of Monson's self-defense theory, or how an inspection *two years after the crime* was likely to be fruitful. Monson has not addressed any of these issues on appeal.

Accordingly, Monson has not met his burden of showing that any alleged error was prejudicial.

### III. *Youth Offender Parole Hearing*

Monson contends that because he was 25 at the time of the offense, and because the Legislature subsequently extended the right to youth offender parole hearings to offenders who were 25 or younger at the time of their offense, he is entitled to a limited remand so the parties may make a record of information relevant to his eventual youth offender parole hearing. The Attorney General agrees, as do we.

When Monson was sentenced on October 20, 2017, former section 3051 provided youth offender parole hearings to offenders who were under 23 years of age when they committed their controlling offense. (Former § 3051, subd. (a)(1); Stats. 2017, ch. 675,

§ 1.) Effective January 1, 2018, the Legislature amended section 3051 to extend eligibility for youth offender parole hearings to individuals who, like Monson, were 25 years of age or younger when they committed their controlling offense. (Stats. 2017, ch. 675, § 1.) "A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger . . . at the time of his or her controlling offense." (§ 3051, subd. (a)(1).) At that hearing, the Board of Parole Hearings (Board) must "give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).) The California Supreme Court has held that youth offenders (as defined in section 3051) must be given the opportunity to make a record of information relevant to a future youth offender parole hearing. (*People v. Franklin* (2016) 63 Cal.4th 261, 278-280; see *People v. Perez* (2016) 3 Cal.App.5th 612, 619.) Because Monson was not afforded that opportunity at sentencing—because the statute had not yet been amended to apply to offenders his age—we remand for the limited purpose of allowing both parties "to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors . . . in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime . . . ." (*Franklin*, at p. 284.)

#### IV. *Firearm-Use Enhancement*

When the trial court sentenced Monson, it lacked the discretion to strike the firearm-use enhancement it imposed. (Former § 12022.53, subd. (h) ["the court *shall not* strike an allegation under this section"], italics added.) The Legislature has since amended the statute so that now "[t]he court *may*, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h), italics added.) The current iteration further provides, "The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (*Ibid.*) Our court has held that this amendment applies retroactively to all nonfinal convictions. (See *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507.) Accordingly, on remand, the trial court must exercise its newly vested discretion under section 12022.53, subdivision (h) to determine whether to strike the enhancement under section 12022.53, subdivision (d). We express no opinion on how the trial court should exercise its discretion in this regard.

#### DISPOSITION

The sentence is vacated and the matter is remanded for the limited purposes of allowing (1) the parties to make a record for the eventual youth offender parole hearing, and (2) the trial court to exercise its discretion under section 12022.53, subdivision (h) to determine whether to strike the firearm enhancement under section 12022.53, subdivision (d). Upon resentencing, the trial court is directed to issue a new abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

The judgment is affirmed in all other respects.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.